

BEFORE THE
UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON RESOURCES

Testimony of Donald D. Kraus,

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Good afternoon. My name is Don Kraus. I am the General Manager of The Central Nebraska Public Power and Irrigation District (Central). Central is a not-for-profit political subdivision, governed by a board of elected representatives, established under the laws of Nebraska to provide surface water irrigation and hydropower. Our Kingsley Dam Project stores water in Lake McConaughy in western Nebraska for an irrigation distribution system 150 miles downstream in the central Platte River area. We provide surface water for approximately 220,000 acres of farmland, and indirectly serve over 300,000 additional acres irrigated from wells by maintaining a reliable elevated groundwater table. The project also produces hydropower, which we sell in the wholesale market.

I am primarily testifying today about the Cooperative Agreement, but I also have some comments on the proposed critical habitat designation for piping plover.

Central's hydroelectric plants are licensed by the Federal Energy Regulatory Commission. In the mid-1980s Central and the Nebraska Public Power District (NPPD) (collectively the Districts) began proceedings to renew our long-term licenses for the Kingsley Dam project and a smaller, interrelated project operated by NPPD. This provided the "federal nexus" needed to invoke the consultation requirements of the Endangered Species Act. The Fish and Wildlife Service (Service) proposed that substantial environmental conditions be placed in our licenses. The water release conditions implicated the water rights of thousands of Nebraska farmers, and would have substantially reduced their protection against drought. By our estimate, the Service's final proposed conditions would have cost over \$150 million. Central expected to bear about 80% of that burden. Our total annual budget is about \$10 million.

To put this in perspective, the Districts' projects are two among hundreds on the North or South Platte Rivers. The Service did not apportion mitigation among those projects, but instead tried to get as much as possible from each project as it needed a federal permit. This approach was not efficient or equitable. After ten years, the Districts had spent over \$35 million on legal fees and technical studies with no reasonable end in sight.

Water projects needed federal approvals in each basin state, including federal dams on the North Platte River that serve Wyoming and western Nebraska and municipal water projects in Colorado. The states and the Department of the Interior agreed in 1994 to try to develop a basin-wide cooperative approach. This led to the Cooperative Agreement of 1997 and the bare bones of a basin-wide Program. The process to fill in Program details is now in its final phase. If adopted, the proposed Program will provide habitat land and water to benefit three threatened or endangered species: the whooping crane, the interior least tern and the piping plover. It will also test whether actions taken for these species might benefit the endangered pallid sturgeon, which occasionally enters the lower Platte.

The proposed Program is phased. During the first thirteen-year increment, it will acquire and protect 10,000 acres of habitat, working toward a long-term goal of 29,000 acres. The proposed Program also provides for environmental flows in the river. Flows now fall short of Fish and Wildlife Service "target flows" by an average of 417,000 acre-feet in an average year. The Districts and others believe that the target flows are not justified, but we have agreed that during the first increment, the Program will reduce shortages to target flows by 130-150,000 acre-feet. The long-term Program water goal is undefined - "sufficient" flows for species needs.

These measures provide ESA compliance for all water-related activities that existed as of July 1, 1997, the date the Cooperative Agreement was signed. The proposed Program also has new depletions programs to be administered by the individual basin states. They mitigate the impacts on target flows of any water use added later.

The Cooperative Agreement allowed the Districts to settle their FERC licensing proceedings based on our participation in the anticipated Program to address the entire basin together. This settlement would not have been possible without the leadership of the Denver office of the Fish and Wildlife Service. Under the settlement, the Districts provide storage in an "environmental account" for water we contribute and for Program water from upstream projects, 2650 acres of habitat and annual species and habitat monitoring. Additional license requirement include a further 4700 acres of non-Program habitat. The measures in our license will cost about \$20 million. I want to note that we could offer a significant amount of water in a proposed Program because the Program will mitigate the impacts of new development on our project.

The relicensing proceeding was long and contentious because decisions had to be made up front, leaving no way to accommodate our sharp technical disagreements. It is easy to agree that we should use the "best science", but when scientists disagree, it is not so easy to agree on whose science is best, or what is a conservative approach and what is mere speculation. Substantial technical disagreement remains today, but we have looked for ways to go beyond that disagreement. First, the proposed Program is phased, so that long-term goals and commitments are periodically revisited. Second, the proposed Program is committed to an "adaptive management" approach. We agreed to disagree, and to use the Fish and Wildlife Service's approach to land and water as a starting point. But we are also actively exploring alternatives, carrying out extensive monitoring and research, arranging for peer review, and changing our approach as experience or research warrants. Third, decisions are to be collaborative. The Program gives both our state and the water users voting seats and prevents unilateral changes of direction. The Program is also committed to involving local land and water users in Nebraska, to working with only willing participants, to paying taxes on Program lands and to acting as a good neighbor.

These aspects of the proposed Program were critical to reaching agreement but are also the most difficult to analyze and to carry into specific planning. As a result, they have been revisited over and over again. I want to commend Ralph Morgenweck, the Director of the Denver office of the Fish and Wildlife Service on

adopting this innovative approach in lieu of command and control, and on his hard work to find and keep a difficult balance between certainty and flexibility. It has clearly been a struggle both within his organization and with stakeholders to find the right balance, and that struggle is not yet over. But Ralph's willingness to use creativity has been essential and will continue to be needed for the Program to succeed.

Central supports the proposed Program because it beats the alternative. Bluntly, if the Cooperative Agreement does not lead to a Program, or the Program fails, the FERC proceedings could be reopened and further measures imposed on the Districts. Other "federal nexus" water related activities, such as the irrigation projects in the Nebraska panhandle that receive water from federal reservoirs in Wyoming, also have strong incentives to participate.

But for new water users without a clear federal nexus, the Program's new depletions plan is difficult to swallow. Program benefits to these water users are limited and mitigation water will be costly - probably beyond their willingness to pay. In Nebraska, development of a new depletions plan may involved statutory changes, and addressing surface vs. ground water issues that have not fully matured. In addition, some Nebraskans are very disturbed at inviting the federal government into decisions about private property. For a Program to be adopted, it must be in the interests of the state as a whole. The state has and will continue to need to commit substantial resources to address the new depletions issues.

Unfortunately, a greater commitment of resources is needed elsewhere as well. When the Cooperative Agreement was signed, total costs of the first ten- to thirteen-year increment were estimated to be \$75 million, not including the costs of new depletions programs. At this point, estimates have risen to \$150 million, and are not final. There are several reasons for the increase. Land prices have risen sharply as groups began buying river lands for hunting. Experience has shown that some land restoration costs were not correct. A study of water supply and conservation options showed that water will be more difficult and expensive to obtain than anticipated. In addition, about a year and a half ago, the Department of the Interior raised issues about sediment transport and vegetation control based on preliminary studies for the environmental impact statement. After coordination with outside consultants, we agreed to expand our research in this area, including small-scale exploration of potential sediment and vegetation control measures on Program lands, and then to apply successful measures as appropriate on other Program lands. These activities increased both research and restoration costs. The sediment and vegetation issues and efforts to define Program success also made us look hard at the research and monitoring program, to be sure it will give us the data and experience to "adaptively manage" the Program as we intended. In addition, we naively expected administrative costs of a Program to be minimal, with Program participants donating needed support. Experience has shown we will need a small staff. While efforts are always made to keep costs as low as possible, we need the tools for success and they will cost more than we first thought.

Our biggest problem is where to get the money and water to carry out a Program. If and when we agree on Program details, we anticipate coming to you with our hats in our hands. Federal environmental law and policy are established on behalf of the entire nation. Here, they are applied to migratory species that simply visit in our area, to our great expense. Typically two to six whooping cranes visit in the spring for a few days. Longer visits, and fall stopovers are more rare. The interior least tern and piping plover arrive in June, nest, fledge their young, and are gone by mid-August.

If it is in the nation's interest to offer these birds special protections during their stays in Nebraska, I would respectfully submit that the nation needs to help pay for those protections. Nebraska has a limited population to tax and its ability to support a more costly Program is limited. This is particularly true since the costs of a new depletions program are also much more than anticipated. Opportunity costs of foregone

development could also be substantial and affect the tax base. It should also be recognized that the states are contributing water to the Program with value that is not well represented by the cost figures. The three major state water projects have an estimated yield of 80 thousand acre-feet in reduction of flow shortages. The Cooperative Agreement assigns these projects a negotiated "cost" of under \$17 million over the first thirteen years, but replacing that water could cost five times that amount. For these reasons, I believe that the Federal Government should and will need to bear the majority of costs of a Program. If not, the cost to federal policy is piecemeal litigation, risk regarding outcome, lack of coordination through the basin, and delay. When we come to you in Congress to ask for federal appropriations, and I urge you give us your support.

I would like to comment briefly on the proposed piping plover critical habitat designation. Frankly, it plays into all of the fears of farmers up and down the Platte River Valley about letting the federal government in the door through a Program.

The proposed designation for the Platte River is not well grounded in science or law. Critical habitat designation is intended for areas with substantial current species use - not areas where species use is rare or hoped for or expected in the future if management changes are made. Areas that are already protected by other programs or plans do not need to be designated.

These standards were applied to other rivers in the notice, but contrast sharply with the proposal to designate the entire 200-mile Platte River from Cozad to the mouth. Very few piping plover nest in the central Platte River region. Those that do nest in the area use managed, protected areas or sandpits near the river. Bird-use data from sandpits are the only justification for including many reaches of the central Platte River, but the sandpit areas themselves are excluded. On other rivers, the Fish and Wildlife Service specifically excluded areas of similar limited and ephemeral use. The Service should be consistent in its approach to the Platte River.

Perhaps portions of the Platte River, particularly the lower Platte, are appropriate to designate. But in proposing to designate the entire central Platte River, the Fish and Wildlife Service contradicts itself. Throughout our relicensing proceeding we were told that the central Platte River had little or no suitable habitat for piping plovers. That was why the Service needed large-scale mitigation, and ultimately a Cooperative Agreement and a Program. Now we are told the entire river's habitat is already in a condition that must be preserved for the species to survive. This does not make sense, and it undermines the credibility of the collaborative efforts in the Cooperative Agreement.

Perhaps the Service is looking ahead to conditions that may exist under the proposed Program or after individual water user mitigation. If so, the law is clear that critical habitat designation is not available until the habitat actually exists. Perhaps there is a fear that we will no longer be willing to address piping plovers in the central Platte River area if it is not designated critical habitat. Certainly the ESA doesn't recognize this justification. I want to be clear that Central, under its license and through the Program, will be actively working toward achieving habitat for piping plovers whether or not there is a designation of critical habitat in the area. The Cooperative Agreement and proposed Program were developed without such a designation and will also continue regardless.

After desirable habitat for piping plover has been created in the central Platte area, the Service can consider critical habitat designation. I would expect, however, that designation would then be unnecessary because the lands will already be protected by a Program or by whatever agency ordered the habitat restoration. Piping plover habitat on the shores of Central's Lake McConaughy was excluded from the proposed designation because these lands are already protected under the terms of our FERC shoreline management

plan. Managed riverine piping plover habitat should be treated similarly.

The Program is written so that the proposed critical habitat designation should not impact covered water-related activities. But in my view, the economic report provided by the Service is completely inadequate in addressing impacts if the Program is not adopted, and on water users not covered by the Program. Our experience with critical habitat has been high expense for studies, high expense for litigation, high expense for mitigation measures, lengthy delays in federal and state approvals, and lost opportunity costs.

I thank you for you for this opportunity to offer testimony for your consideration, and for your time.

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